

SPECIAL
84-1580

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

April 20, 1984

LEGISLATIVE REFERRAL MEMORANDUM

TO: Legislative Liaison Officer

General Services Administration
Department of Defense
Central Intelligence Agency ✓
National Security Council
Department of the Treasury

SUBJECT: Justice views on S. 905 and H.R. 3987, the "National Archives and Records Administration Act of 1984."

The Office of Management and Budget requests the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with OMB Circular A-19.

Please provide us with your views no later than COB April 23, 1984.
NOTE: We will assume your concurrence if we don't hear from you.

Direct your questions to Gregory Jones (395-3856), of this office.

4-23-Called OMB to indicate our understanding and support for DOJ's concerns + "no objection" to their opposition to enactment.

Gregory Jones Jr.
James C. Murr for
Assistant Director for
Legislative Reference

STAT

Enclosures

cc: M. Chaffee
F. Reeder
J. Coffey



Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

Honorable William V. Roth, Jr.
Chairman
Committee on Governmental Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This presents the views of the Department of Justice on the "National Archives and Records Administration Act of 1984." The Department of Justice objects to the enactment of S. 905.

S. 905 would remove the National Archives and Records Service (NARS) from the General Services Administration (GSA), create a National Archives and Records Administration built on the existing NARS, and transfer statutory responsibilities for archival and records management functions in the Federal government to the agency, under the administration of the Archivist of the United States.

The Department is concerned about section 2(e) of the bill which would add a new 44 U.S.C. §2105(f). 44 U.S.C. §2105(f) would broaden the responsibilities and authority of the Archivist beyond those currently held by the Administrator of the GSA. This proposal would at the minimum, confuse the question as to whether the Archivist can have access to the records of components of the Department of Justice, such as the Federal Bureau of Investigation, over the objection or without the approval of the Attorney General. The Department is concerned that such language might give Archivist personnel unrestricted access to classified information, informant files, information relating to pending investigations, Foreign Intelligence Surveillance Act records, Title III information, Federal grand jury matters, or tax information provided to the Department pursuant to 26 U.S.C. §6103.

Additionally, section 2(e) of the bill would add 44 U.S.C. §2105(a), which authorizes the general promulgation of regulations by the NARS. This section provides that each agency must adopt such orders and directives as necessary to conform its activities to the NARS regulations. These provisions would make agencies completely subject to the authority of NARS and would make the Archivist the sole arbiter of any conflict between NARS and an agency. We find this provision to be particularly troublesome.

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The Department of Justice recommends against enactment of this legislation.

The Office of Management and Budget has advised this Department that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

Robert A. McConnell
Assistant Attorney General



Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

Honorable Jack Brooks
Chairman
Committee on Government Operations
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This presents the views of the Department of Justice on H.R. 3987, a bill "To improve the preservation and management of federal records and for other purposes," as ordered reported by the Committee on Government Operations. The Department of Justice opposes the enactment of this legislation.

H.R. 3987 would accomplish essentially two separate objectives. First, it would remove the National Archives and Records Service from the General Services Administration ("GSA"), and establish it as an independent entity, the National Archives and Records Administration, under the supervision and direction of the Archivist of the United States. The Archivist would be a Presidential appointee, but appointed for a ten year term without regard to political affiliations. The bill would amend various statutes pertaining to the Archives, in order to conform with the proposed establishment of the Archives Administration.

Second, H.R. 3987 would delegate to the Archivist substantially greater powers and functions than those presently delegated to GSA, the agency currently responsible for the management and administration of the National Archives. Section 102 of the bill would amend 44 U.S.C. § 2104 to authorize the Archivist to prescribe regulations on all aspects of the National Archives and Records Administration's functions that are binding on the heads of all federal agencies, and to require each federal agency, upon request, to provide the Archivist unlimited access to the information and data of that agency. Section 103(b)(3) would transfer the responsibilities under sections 5.1(b) and 5.2(a) of Executive Order No. 12356 (relating to national security information and the Information Security Oversight Office), from GSA to the Archivist. Section 107(b)(15) would amend 44 U.S.C. § 2904 to expand the Archivist's responsibility for ensuring that agencies

ensure adequate and proper documentation of the policies and transactions of the federal government. Section 203 of the bill would grant the Archivist new authority to bring an action for the recovery of materials believed to have been wrongfully removed, where the agency head has failed to do so. Section 204 would amend 44 U.S.C. § 3301 to provide the Archivist unlimited authority to inspect any records of any federal agency to determine compliance with the provisions of the Records Disposal Act, 44 U.S.C. § 3301 et seq., and would transfer from the head of each federal agency to the Archivist the responsibility to determine which records are appropriate for preservation by that agency as evidence of its organization, functions, policies, and operations, or because of their informational value.

We understand that the principal purpose of the first of these two objectives is to provide a greater measure of stature, independence, and budgetary stability for the National Archives as an independent establishment rather than as a component of GSA. This bill would indeed provide for a separate budgetary process, but it should be understood that the Archivist would not be independent from the direction of the President. We note that the Archivist and the National Archives and Records Administration would still be a part of the Executive Branch, see 44 U.S.C. § 2102, as added by section 101 of the bill. Accordingly, they would be subject to the direction of the President as is GSA and all other Executive establishments. Officers of the United States acting on questions of policy are the President's alter egos, "who act by his authority and in conformity with his orders." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 164 (1803); 7 Op. Att'y Gen. 453, 469-70 (1855) (Opinion of Attorney General Cushing that the President controls the official acts of Heads of Departments). Moreover, proposed 44 U.S.C. § 2103(a), as added by section 102 of H.R. 3987 reported by the Committee on Government Operations, correctly provides that the Archivist may be removed from office by the President.

The Department's principal concerns, however, relate to the second objective of the bill, to expand substantially the authority of the Archivist over the records and the records policies of the federal agencies. In particular, the amendments made by sections 102 and 204 of H.R. 3987 appear to authorize unbridled access by the Archivist to the records of all federal agencies. We are also concerned about section 203, which would expand the enforcement authority of the Archivist to initiate suit for the retrieval of documents believed to have been wrongfully removed from the custody of a federal agency. We do not believe that these changes are either needed or appropriate. Although we perceive no direct conflict with the Freedom of Information Act, 5 U.S.C. § 552, we oppose the enactment of section 102 of the bill, which would add a new 44 U.S.C. § 2104(a) and (f), section 203 of the bill, which would amend 44 U.S.C. §§ 2905 and 3106, and section 204 of the bill, which would amend 44 U.S.C. § 3301.

Litigation Authority

The Department believes that the existing statutes governing records retention and management provide adequate administrative remedies, pursuant to 44 U.S.C. §§ 2905 and 3106, for violations of the Federal Records Act, and that the unprecedented right of the Archivist's to initiate, through the Attorney General, a retrieval action would be unnecessary and unwarranted. Under existing law, when an agency determines that records have been improperly removed from its custody, the agency head, the Administrator of GSA, and the Attorney General must make a determination whether to initiate suit to retrieve the documents.

The amendments would clearly undercut the agency's own determination on whether a retrieval action for documents wrongfully removed from its custody would be justified in a particular instance. Further, the Department is concerned that the proposed amendments might be construed to undermine the Attorney General's discretionary exercise of his authority whether to initiate a lawsuit to retrieve wrongfully removed documents. It is unclear what would be gained, in a case where the agency head, the Administrator of GSA, and the Attorney General already have determined not to bring such an action, by authorizing the Archivist to bring his own action, through the Attorney General.

To be sure, the Department notes with approval that the version of the bill reported by the Committee does not provide for the Archivist to conduct such litigation independent of the authority of the Attorney General, as did the original version of this bill. Centralization of litigation authority in the Attorney General was first established in 1870 when the Department of Justice was created. Congress has identified the legal officers who are to protect the rights of the government under the records management and disposal laws codified at chapters 21, 29, 31 and 33 of Title 44 of the United States Code, i.e., the Attorney General and the Department of Justice. Sutherland v. International Insurance Co., 43 F.2d 969 (2d Cir.), cert. denied, 282 U.S. 890 (1930). Such centralization furthers the important policy goals of ensuring that the government speaks with one voice, ensuring consideration of the potential impact of litigation upon the government as a whole, and facilitating presidential supervision over Executive Branch policies implicated in litigation. To grant independent litigation authority to the Archivist would have seriously impaired those goals.

Access to and Evaluation of Agency Records

The Department has serious reservations about section 204 of the bill, which would amend 44 U.S.C. § 3301, pertaining to the determination of whether a record is subject to the stringent records retention requirements of the Records Disposal Act, 44 U.S.C. § 3301, et seq. Essentially, the proposed provision would permit the Archivist to overrule determinations made by an agency head on whether an agency record comes within the purview

of the Act. We fear that such a procedure could result in inaccurate determinations on whether documents are subject to the statute. The agency is much more qualified and able to assess the nature of the documents within its custody than the Archivist. We believe that each agency should continue to make its own determinations, based on its expertise and familiarity with documents within its custody or possession and under general government-wide guidelines governing such decisions, as to whether its documents are subject to the requirements of the Records Disposal Act. Under existing law, there are adequate statutory provisions and departmental regulations issued thereunder to achieve the purposes of that Act.

It should be noted that section 204 of H.R. 3987 appears to contradict the provisions of 44 U.S.C. § 2906(a)(2). In its existing form and also as amended by section 103(b)(16) of the bill, § 2906(a)(2) provides that "Records, the use of which is restricted by law or for reasons of national security or the public interest, shall be inspected, in accordance with regulations promulgated by the Administrator [and the Archivist], subject to the approval of the head of the agency concerned or of the President." The proposed amendment to § 3301 would be inconsistent, appearing to eliminate the discretionary authority of the agency head or of the President to limit access to certain records, and would directly conflict with Executive Order 12356 governing access to classified National Security Information. 44 U.S.C. § 2104(f), as added by section 102 of the bill, also would require any federal agency to furnish any information to the Archivist upon request.

These provisions would, at a minimum, confuse the question as to whether the Archivist can have access to records of the Department of Justice or of one of the Department's components, the Federal Bureau of Investigation, over the objection or without the approval of the Attorney General or the Director of the FBI. The Department is concerned that such language might give Archives personnel unrestricted access to classified information, informant files, information relating to pending investigations, Foreign Intelligence Surveillance Act records, Title III wiretap information, federal grand jury matters, or tax information provided to the Department pursuant to 26 U.S.C. § 6103. Our recent experience has shown that National Archives employees often do not have current full-field investigations or appropriate security clearances necessary to gain access to the various levels of national security information, including Sensitive Compartmented Information. To permit unrestricted access to sensitive records and/or classified information could compromise ongoing investigations, reveal the identities of informants, endanger the lives and safety of Department employees, seriously impede the mission of the Department of Justice, and possibly endanger the national security.

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Promulgation of Regulations by the Archivist

Finally, we note that section 102 of the bill would add a new 44 U.S.C. § 2104(a), authorizing the Archivist to promulgate general regulations, and providing that each agency must adopt such orders and directives as necessary to conform its activities to the Archivist's regulations. These provisions would make all federal agencies completely subject to the authority of the Archivist, and would make the Archivist the sole arbiter of any conflict between an agency and the Archivist's staff. Notwithstanding our observations above that the Archivist would continue to be subject to the President's direction and supervision, we find this concentration of unbridled authority in the Archivist to be particularly troublesome.

For the foregoing reasons, the Department of Justice recommends against enactment of this legislation.

The Office of Management and Budget has advised this Department that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

ROBERT A. McCONNELL
Assistant Attorney General